Supreme Court, U.S.
FILED

001175 JAN 19 2001

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

DAVID J. REESE,

Petitioner,

v.

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, LAW ENFORCEMENT OFFICERS TRAINING COUNCIL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TERRY F. BURKHART (P30282)
Counsel of Record
DAVID REESE
BUTCH, QUINN, ROSEMURGY, JARDIS,
BUSH, BURKHART & PARKS, P.C.
816 LUDINGTON STREET
ESCANABA, MI 49829
(906) 786-4422

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

Eleventh Amendment Immunity

Whether Title I and Title II of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1995 and Supp 2000), are proper exercises of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of Congressional power to abrogate the States' Eleventh Amendment immunity from suits by individuals.

Forfeiture or Waiver of Eleventh Amendment Immunity

Whether Eleventh Amendment immunity is a matter akin to personal jurisdiction which can be forfeited or waived by States, as a result of which the Court of Appeals erred by considering the issue *sua sponte*, despite the fact that it was never raised as an affirmative defense, briefed, or argued by the State of Michigan at any time in the original or appellate proceedings.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner David Reese is an individual with no corporate affiliations.

Respondent

State of Michigan
Michigan State Police
Michigan Law Enforcement Officers Training Council (Now known as Commission on Law Enforcement Standards)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

ARGUMENT FOR GRANTING THE WRIT 7

ELEVENTH AMENDMENT IMMUNITY ... 7

FORFEITURE OR WAIVER OF ELEVENTH AMENDMENT IMMUNITY ... 8

CONCLUSION 10

APPENDIX

Appendix A
Court of Appeals Opinion, 10/24/00 ..... 1a

Appendix B
District Court Opinion and Order,
1/11/99 . . . . . 23a

Appendix C
District Court Judgment, 10/2/98 . . . . . 33a

Appendix D
District Court Supplemental Order,
6/26/98 . . . . . 37a

Appendix E
District Court Opinion and Order,
5/29/98 . . . . . 39a

TABLE OF AUTHORITIES

Cases

Alsbrook v. City of Maumelle,
184 F.3d 999 (8th Cir. 1999), *cert. granted in part,* 120 S. Ct. 1003, *cert. dismissed,* 120 S. Ct. 1265 (Mar. 1, 2000) 7

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 8

Brown v. North Carolina Division of Motor Vehicles,
166 F.3d 698 (4th Cir. 1999) 7

Clark v. Barnard,
108 U.S. 436 (1883) 8

Clark v. California,
123 F. 3d 1267 (9th Cir. 1997) *cert. denied,* 118 S. Ct. 2340 (U.S. June 1998) (No. 97-686) 7

Coolbaugh v. Louisiana,
136 F. 3d 430 (5th Cir. 1998) *cert. denied,* 119 S. Ct. 58 (U.S. Oct. 5, 1998) (No. 97-1941) 7

Erickson v. Board of Governors of State Colleges and Universities of Northeastern Illinois University,
207 F. 3d 945 (7th Cir. 2000) 7

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 4

Hill v. Blind Industries and Services,
179 F.3d 754 (9th Cir. 1999) *amended, rehearing en banc denied at* 201 F.3d 1186 (9th Cir. Or. 2000) *reprinted as amended* 1999 U. S. App LEXIS 35237 10

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 9

In re Burlington Motors Holdings, Inc.,
242 B.R. 156 (Bankr. Del 1999) 10

In re Platter,
140 F.3d 676 (7th Cir. 1998) 10

Jackan v. New York State Dep't of Labor,
205 F.3d 562 (2nd Cir. 2000) 7

Martin v. Kansas,
190 F.3d 1120 (10th Cir. 1999) 7

Patsy v. Board of Regents of Florida,
457 U.S. 496 (1982) 4, 8

Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division,
227 F.3d 627 (6th Cir. 2000) 8

Sutton v. Utah State School for the Deaf and Blind,
173 F.3d 1226 (10th Cir. 1999) 10

Torres v. Puerto Rico Tourism Company,
175 F.3d 1 (1st Cir. 1999) 9

University of Alabama at Birmingham Bd. of Trustees v. Garrett, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (U.S. Apr 17, 2000) (NO. 99-1240) 7, 10

Wisconsin Department of Corrections v. Schacht, 524 U.S. 381 (1998) 4, 8, 9

Statutes and Other Authorities

U.S. Const., Amdt. XI . . . . . *passim*

U.S. Const., Amdt. XIV (Equal Protection clause) . . . . . i, 2, 7, 8

28 U.S.C. § 1254 (1) 1

28 U.S.C. § 2403(a) 1

Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*

42 U.S.C. 12101 i
42 U.S.C. 12101(b)(4) 2, 4
42 U.S.C. 12111 5
42 U.S.C. 12111(2) 4
42 U.S.C. 12111(5)(A) 4
42 U.S.C. 12111(7) 4
42 U.S.C. 12112(a) 2, 4
42 U.S.C. 12131 . . . . . 4, 5
42 U.S.C. 12132 . . . . . 3, 5
42 U.S.C. 12133 5
42 U.S.C. 12134 5
42 U.S.C. 12202 . . . . . 3, 4

Civil Rights Act of 1964, Title VII,
42 U.S.C. 2000e, *et seq.* 4, 5

MCL § 28.601 *et seq.*; MSA 4.450 *et seq.* 5

PETITION FOR A WRIT OF CERTIORARI

Terry F. Burkhart, of Butch, Quinn, Rosemurgy, Jardis, Bush, Burkhart & Parks, P.C., on behalf of David Reese, respectfully petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgement of the Court of Appeals was entered on October 24, 2000. It was not recommended for publication (App. A at 1a-22a). The opinions of the District Court (App. B at 23a-32a & E at 39a-53a) are also unreported.

JURISDICTION

The judgement of the Court of Appeals was entered on October 24, 2000. There was no request for rehearing. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1). 28 U.S.C. § 2403(a) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

2. The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

3. Section 12101(b) of Title 42

It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities.

4. Section 12112(a) of Title 42

General rule- No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application

procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other conditions, and privileges of employment.

5. Section 12132 of Title 42

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

6. Section 12202 of Title 42

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State Court of competent jurisdiction for violation of this chapter. In any action against a State for violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation in an action against any public or private entity other than a State.

STATEMENT OF THE CASE

1. Title I of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, makes it unlawful for covered entities to discriminate against the disabled in the terms and conditions of their employment. 42 U.S.C. § 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees", 42 U.S.C. § 12111(2) and (5)(A) and the term "Person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which includes States. 42 U.S.C. § 12111(7); cf. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 449 & n.2 (1976). The ADA specifically mandates that States are not immune from liability. 42 U.S.C.
§ 12202.

2. Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.* makes it unlawful for covered entities to discriminate against the disabled in the provision of services.

3. The Eleventh Amendment to the Constitution of the United States enacts a sovereign immunity from suit. However, this immunity can be waived, and courts need not raise the issue *sua sponte*. *See Patsy v. Board of Regents of Florida,* 457 U.S. 496, 516, n 19 (1982); *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998).

4. Plaintiff David Reese, who had a successful career in law enforcement despite a severe color vision deficit, applied for a job as a public safety officer in

Escanaba, Michigan in 1993. Defendant Michigan Law Enforcement Officers Training Council (MLEOTC) is the state agency responsible for certifying applicants to work as law enforcement officers in the State of Michigan (MCL § 28.601 *et seq.*; MSA 4.450 *et seq.*).

5. MLEOTC established selection and training requirements for law enforcement officers, including a "normal" color vision standard. Reese was approved for certification as a law enforcement officer in all other respects but he was denied certification because he was unable to satisfy MLEOTC's "normal" color vision standard. After being issued a "right to sue" letter by the Equal Employment Opportunity Commission, Reese sued MLEOTC under Title I of the ADA, 42 U.S.C. § 12111 *et seq.* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*

6. The Title I claim alleged that he was a "qualified individual with a disability" under the ADA and that he was denied employment based solely on his color vision deficit. The Title VII claim alleged that there was a disparate impact on men because color vision deficits are a sex related trait. Pursuant to stipulation, Reese's original complaint was amended to include a claim under Title II of the ADA, 42 U.S. C. §§ 12131-12134 regarding discrimination by states as to the provision of services.

7. MLEOTC filed a pre-trial motion arguing that Reese was neither actually disabled nor perceived as disabled within the meaning of the ADA. The U.S. District Court for the Western District of Michigan, Northern

Division, denied MLEOTC's pre-trial motion and granted partial summary judgement for Reese on the issue of "disability", expressly finding that there was no genuine issue of material fact and that Reese was either "disabled" or "perceived as disabled" by the state under the ADA.

8. Shortly prior to trial, at the trial court's suggestion, plaintiff and defendant stipulated to withdraw the Title VII claim on the basis that, under the undisputed facts of the case, it was unnecessarily duplicative. The matter proceeded to trial, and the jury returned a verdict in Reese's favor, finding that Reese was qualified to perform the essential functions of a certified law enforcement officer for the State of Michigan and that MLEOTC failed to prove that Reese could not perform the essential functions of a law enforcement officer without presenting a direct threat to the health or safety of himself or others. MLEOTC filed post trial motions for judgement as a matter of law or for a new trial based solely on the question of whether Reese was "disabled" under the ADA. No post trial motion was filed alleging that the specific jury finding that Reese was "qualified" within the meaning of the ADA was against the great weight of the evidence.

9. At no time during the course of the proceedings below did the State of Michigan raise Eleventh Amendment immunity as a defense, affirmative or otherwise. The United States Court of Appeals for the Sixth Circuit raised the issue *sua sponte,* and dismissed Reese's claims on the basis of Eleventh Amendment immunity.

ARGUMENT FOR GRANTING THE WRIT

Eleventh Amendment Immunity

On April 17, 2000, this Court granted review in *University of Alabama at Birmingham Bd. of Trustees v. Garrett*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (U.S. Apr. 17, 2000) (NO. 99-1240) and has recently heard oral argument on the case. (Oct. 11, 2000). In regard to Title I and Title II of the ADA, the issue of the Act's abrogation of Eleventh Amendment immunity presented in this petition is identical to the question presented in 99-1240. Moreover, as noted in the United States Brief for the Petitioner in No. 99-1240, the conflict between the various circuit courts of appeals on this issue "is firmly entrenched and incapable of resolution absent intervening action by this Court", United States' Brief at 11, *University of Alabama at Birmingham Bd. Of Trustees v. Garrett,* 193 F.3d 1214, (11th Cir. 1999)(99-1240). Compare *Jackan v. New York State Dep't of Labor*, 205 F.3d 562 (2nd Cir. 2000), *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998) *cert. denied*, 119 S. Ct. 58 (U.S. Oct. 5, 1998) (No. 97-1941), *Clark v. California*, 123 F.3d 1267 (9th Cir 1997) *cert. denied*, 118 S. Ct. 2340 (U.S. June 1998) (No. 97-686), *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999), *University of Alabama at Birmingham Bd. Of Trustees v. Garrett*, 193 F3d 1214, (11th Cir. 1999) *cert. granted* 120 S. Ct. 1669 (U.S. Apr. 17, 2000) (99-1240) (abrogation of Eleventh Amendment immunity under the ADA was a valid exercise of Congress's powers pursuant to Section 5 of the Fourteenth Amendment) with *Brown v. North Carolina Division of Motor Vehicles,* 166 F.3d 698 (4th Cir. 1999), *Erickson v. Board of Governors of State Colleges and Universities of Northeastern Illinois University*, 207 F.3d 945, (7th Cir. 2000), *Alsbrook v. City of Maumelle,* 184 F.3d 999 (8th Cir. 1999), *cert. granted in*

part, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct 1265 (Mar. 1, 2000) (Congress's attempt to abrogate Eleventh Amendment Immunity under the ADA was improper exercise of enforcement power in Fourteenth Amendment). It should also be noted that the Sixth Circuit has recently, *en banc*, vacated *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division*, 227 F.3d 627 (6th Cir. 2000) until the decision of this Court in *Garrett* is announced. Accordingly, this petition should be held pending the Court's decision in NO. 99-1240, or, in the alternative, the Petition should be granted.

Forfeiture or Waiver of Eleventh Amendment Immunity

In regard to the forfeiture or waiver of immunity issue, this Court in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998) stated:

> [Rather] the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985); *Clark v. Barnard*, 108 U.S. 436, 447 (1883). Nor need a court raise the defect on its own. Unless a State raises the matter, a court can ignore it. *See Patsy v. Board of Regents of Florida*, 457 U. S. 496, 515, n. 19 (1982)" (*Schacht*, 524 U.S. at 389).

It is clear that a State can make a choice to assert its Eleventh Amendment rights. It is also clear, however, that should a State not choose to make such an assertion, the courts need not, on their own initiative, make the choice for it.

Further, Justice Kennedy wrote in his concurrence to *Schacht*:

> In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgement without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by the principles of res judicata. If the State were to lose, however, it could void the entire judgement simply by asserting its immunity on appeal. (*Schacht,* 524 U.S. at 394)

Justice Kennedy later continued:

> Although the text is framed in terms of the extent of the 'Judicial Power of the United States,' (U.S. Const., Amdt 11), our precedents have treated the Eleventh Amendment as 'enacting a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject matter Jurisdiction.' *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)" (*Schacht,* 524 U.S. at 394)

Justice Kennedy advocated a modification of Eleventh Amendment jurisprudence, making it more consistent with the Court's practice "regarding personal jurisdiction." *Schacht*, 524 U.S. at 395.

The First and Ninth Circuits have recently decided cases where it was determined that a waiver was made when the matter was not pursued at the beginning of the case. See *Torres v. Puerto Rico Tourism Company*, 175 F.3d 1 (1st Cir.

1999); *Hill v. Blind Industries and Services*, 179 F.3d 754 (9th Cir. 1999) *amended, rehearing en banc denied at* 201 F.3d 1186 (9th Cir. Or. 2000) *reprinted as amended* 1999 U. S. App LEXIS 35237. These cases appear to be at odds with those of other circuits where definite action on the part of the state to waive the Eleventh Amendment protection was required, see *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999); *In re Platter,* 140 F.3d 676, (7th Cir. 1998) and still other cases, such as *In re Burlington Motors Holdings, Inc.*, 242 B.R. 156 (Bankr. Del 1999) where the matter of the Eleventh Amendment immunity is treated as an affirmative defense which was waived by the filing of claims against the estate. Clearly there is a split among the circuits, which makes this an appropriate case for the grant of certiorari on the issue of the forfeiture or waiver of Eleventh Amendment immunity.

CONCLUSION

This petition for a Writ of Certiorari should be held pending this Court's Decision in *University of Alabama at Birmingham Bd. of Trustees v. Garrett*, NO. 99-1240 and disposed of in accordance with the Decision in that case.

In the event this Court, in *Garrett*, finds that states are not immune from liability by virtue of the Eleventh Amendment, the decision of the Sixth Circuit Court of Appeals should be reversed and the matter remanded for further proceedings.

In the event this Court finds, in *Garrett*, that states are immune from liability under the Eleventh Amendment, this Court should grant Certiorari to determine whether the State waived its Eleventh Amendment immunity by failing to raise the issue as a defense, affirmative or otherwise, at any point

in the proceedings before the trial court or the Sixth Circuit Court of Appeals.

/s/_____
Terry F. Burkhart (P30282)
Counsel of Record
BUTCH, QUINN, ROSEMURGY,
JARDIS, BUSH, BURKHART & PARKS, P.C.
816 Ludington Street
Escanaba, Michigan 49829
(906) 786-4422

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed October 24, 2000]

No. 99-1173

DAVID J. REESE, *Plaintiff-Appellee*,	)
v.	)
STATE OF MICHIGAN; DEPARTMENT OF STATE POLICE; LAW ENFORCEMENT OFFICERS TRAINING COUNCIL, *Defendant-Appellants*.	)

On Appeal from the United States District Court for the Western District of Michigan

Before: **NELSON, BOGGS, and DAUGHTREY, Circuit Judges.**

PER CURIAM. The Michigan Law Enforcement Officers Training Council (MLEOTC or the Council)[1] appeals the district court's order granting partial summary judgment to plaintiff David J. Reese, a law enforcement officer who suffers from color blindness, on the question of whether Reese is a "qualified individual with a disability" under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111(8); 12131(2). MLEOTC also appeals the district court's denial of its pre-trial motions for summary judgment and for judgment as a matter of law or for new trial, which it filed following a jury verdict in Reese's favor. Because the Eleventh Amendment precludes Reese from pursuing his claims against the defendants, we reverse the grant of partial summary judgment, and the judgment of the district court on the jury verdict for Reese, and remand the case in order that the district court may enter an order dismissing Reese's ADA claims in a manner consistent with this opinion.

I

In 1993, Reese, who made his career in law enforcement officer despite his inability to perceive colors, applied for a job as a public safety officer in Escanaba, Michigan. Defendant MLEOTC is the state agency responsible for certifying applicants to work as law enforcement officers in the state of Michigan. *See* Michigan Statutes Annotated (M.S.A.) § 28.601 *et seq.* To this end,

---

[1]MLEOTC was renamed the "Commission on Law Enforcement Standards" (COLES) in 1998. However, because this case was filed before the Council changed its name, we will, consistent with the parties' filings and the decisions of the lower court, continue to refer to the agency as MLEOTC.

MLEOTC establishes minimum selection and training standards for entry-level law enforcement officers, including a standard color vision test. MLEOTC adopted the color vision requirement at issue in this case in response to findings set forth in a monograph, entitled "Color Vision and Law Enforcement," authored by MLEOTC's optometry expert, Vincent M. King. In concluding that color vision is important to the effective performance of police duties, King relied in large part on a 1994 study commissioned by the State of California on the importance of color vision in law enforcement. The California study, which was based on a police survey, concluded that the ability to identify and distinguish colors was "important" or "very important" to the performance of a patrol officer's work. Consistent with the recommendations advanced in the California study and in King's monograph, MLEOTC adopted an administrative regulation requiring all Michigan law enforcement officers to pass a color vision "panel test" using pseudoisochromatic plates.

Although Reese was approved for the Escanaba job in all other respects, he was denied certification because he was unable to pass MLEOTC's color vision test. Reese, who served the City of Geneva, Illinois, as a highly decorated law enforcement officer for nearly ten years before moving to Michigan, was employed as an uncertified public safety officer by the City of Escanaba from May through July 1993. After being notified that he could no longer work as a law enforcement officer because he lacked the requisite state certification, Reese sued MLEOTC pursuant to Title I of the ADA, 42 U.S.C. § 12201 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was a "qualified individual with a disability" under the

ADA and that he was denied employment based solely on his color-blindness.[2] Reese further alleged that MLEOTC's color vision requirement had a disparate impact on men because color vision deficiency is a sex-related trait.

In response to the allegations in Reese's complaint, MLEOTC filed pre- and post-trial motions arguing that Reese was neither actually disabled nor perceived as disabled by the Council. In addition, MLEOTC argued that its "normal color vision" requirement was a legitimate job qualification and could not be the basis for a discrimination suit. The district court denied MLEOTC's motions, granted partial summary judgment for Reese on the question whether he was "disabled" under the ADA, and sent the case to a jury, which returned a verdict in Reese's favor. MLEOTC now appeals the district court's denial of its motion for summary judgment and of its post-trial motion for judgment as a matter of law or for new trial.

II

Although MLEOTC has not raised the issue of sovereign immunity before this court - it appeals only the district court's denial of its pre- and post-trial motions - we need not decide whether the district court correctly disposed of the case on the merits because the Eleventh Amendment

---

[2]On May 6, 1998, the parties stipulated that Reese's complaint should be construed as asserting claims under both Title I and Title II of the ADA, despite his failure to mention Title II, 42 U.S.C. §§ 12131-12134, in his original pleadings.

precludes Reese from pursuing his ADA claims against the defendants.[3]

Jurisdiction to Consider the Defendants' Eleventh Amendment Immunity

Although neither Reese nor the defendants raised the issue of Eleventh Amendment immunity in the lower court or on appeal, we recently confirmed in *Popovich v. Cuyahoga County Court*, 2000 WL 1335555, at *3 (6th Cir. September 18, 2000), that a party does not waive an Eleventh Amendment defense simply by failing to raise it at the outset of the proceedings. *See Edelman v. Jordan,* 415 U.S. 651, 678 (1974) (holding that Eleventh Amendment immunity may be raised for the first time on appeal). Moreover, because the Supreme Court has treated Eleventh Amendment immunity as a limitation on federal subject matter jurisdiction, we may consider the immunity defense sua sponte even if the parties neglect to raise it. *See Kimel v. Florida Bd. of Regents,* 120 S. Ct. 631, 640 (2000) ("[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States"); *Popovich,* 2000 WL 1335555, at *3 (emphasizing that the Supreme Court's decision in *Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998) - in which the majority held that a court need not address Eleventh Amendment immunity if the parties fail to raise it - does not cast any doubt

---

[3]Although Reese raised claims under Title VII of the Civil Rights Act in addition to his ADA claims, we need not decide whether the Eleventh Amendment bars Reese's Title VII claims because the jury verdict and the district court's grant of partial summary judgment were both entered pursuant only to the ADA.

on the longstanding proposition that we have both jurisdiction and discretion sua sponte to consider the defense); *Mixon v. State of Ohio,* 193 F.3d 389, 397 (6th Cir. 1999) (emphasizing that federal courts of appeals may "sua sponte raise the issue of lack of jurisdiction because of the applicability of the [E]leventh [A]mendment") (internal quotation marks and citations omitted)).[4]

Scope of State Sovereign Immunity Under the Eleventh Amendment

Suits involving the application of Eleventh Amendment immunity to state agencies charged with violating federal civil rights legislation raise normative questions about the relative importance of enforcing federal laws against the states and protecting state sovereignty from federal infringement. The Supreme Court has attempted to balance these competing concerns in a series of decisions clarifying the scope of Eleventh Amendment immunity in suits brought pursuant to, inter alia, Title VII of the Civil Rights Act of 1964,[5] 42

---

[4]Although the Supreme Court's recognition of a state's right, however limited, to waive its immunity seems inconsistent with characterization of the Eleventh Amendment as a limit on federal subject matter jurisdiction, the Court continues to recognize a state's right expressly to waive its immunity and subject itself to suit in the federal courts. *See Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241, (1985).

[5]*See Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976) (upholding Title VII as a valid exercise of Congress's power under § 5 of the Fourteenth Amendment to enforce the guarantees of the Amendment against the states).

U.S.C. § 1983,[6] federal patent and trademark laws,[7] and, most recently, the Age Discrimination in Employment Act.[8] These decisions, along with our own precedents, support our holding that Reese cannot proceed with his claims against MLEOTC under either Title I or Title II of the ADA.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

---

[6]*See Quern v. Jordan,* 440 U.S. 332, 345 (1979) (holding that although § 1983 was enacted pursuant to § 5 of the Fourteenth Amendment, Congress did not "explicitly and by clear language" express its intent to "abrogate the Eleventh Amendment immunity of the States").

[7]*See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,* 119 S. Ct. 2199, 2209-10 (1999) (invalidating Congress's attempt to abrogate state sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act because the scope of the legislation exceeded the bounds of Congress's authority to enforce constitutional guarantees pursuant to § 5 of the Fourteenth Amendment); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999) (invalidating as an improper exercise of its power under § 5 of the Fourteenth Amendment Congress's attempt to abrogate state sovereign immunity in the Trademark Remedy Clarification Act).

[8]*See Kimel v. Florida Bd. of Regents,* 120 S. Ct. 631, 645 (2000) (invalidating Congress's attempt pursuant to § 5 of the Fourteenth Amendment to abrogate state sovereign immunity under the ADEA).

U.S. Const. amend. XI. Although the Amendment on its face prohibits only suits brought against a state by "Citizens of another State," the Supreme Court has long construed the Amendment to protect states from suits filed by their own citizens in federal court on the basis of federal question jurisdiction.[9] *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54, (1996) ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms") (internal quotation marks and citations omitted)); *Edelman v. Jordan,* 415 U.S. 651, 663 (1974) (emphasizing that the Amendment immunizes an unconsenting state "from suits brought in federal courts by her own citizens as well as by citizens of another State").

As we explained in *Popovich*, there are three circumstances in which the Eleventh Amendment will not preclude private litigants from pursuing claims against a state or its agencies in federal court. *See Popovich,* 2000 WL 1335555, at *5. First, the Eleventh Amendment will not bar a suit by private litigants seeking prospective injunctive relief against state officers charged with an ongoing violation of federal law. *See Ex parte Young,* 209 U.S. 123, 167 (1908); *Lawson v. Shelby County, Tennessee,* 211 F.3d 331, 335 (6th

---

[9]Although the Eleventh Amendment has traditionally shielded states only from suit in the federal courts, the Supreme Court recently held that "Eleventh Amendment principles" permit states to assert sovereign immunity as a defense to federal question cases filed in *state* courts. *See Alden v. Maine,* 527 U.S. 706 (1999).

Cir. 2000). This exception is clearly inapplicable in this case, however, because Reese does not assert claims against any individual officers, but only against MLEOTC, the Department of State Police, and the State itself.

Second, a private litigant may proceed with federal litigation against a state or its agencies if the state has waived its Eleventh Amendment immunity and consented to suit in federal court. *See Green v. Mansour,* 474 U.S. 64, 68 (1985); *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241 (1985). Although Justice Kennedy suggests in his concurrence in *Wisconsin Dep't of Corrections v. Schacht* that a defendant state's removal of a case to federal court could be construed as a waiver of Eleventh Amendment immunity, *see Schacht,* 118 S. Ct. at 2057 (Kennedy, J., concurring), MLEOTC's failure to raise the issue of sovereign immunity does not constitute a constructive waiver of the defense. As the Court has made clear in several recent decisions rejecting the doctrine of constructive consent in the Eleventh Amendment context, a state will be deemed to have waived its Eleventh Amendment immunity only if the state itself, rather than a defendant agency, expressly (i.e. by legislative decree) consents to federal jurisdiction in the class of cases encompassing the plaintiff's suit. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (College Savings Bank II),* 119 S. Ct. 2219, 2226 (1999) (emphasizing that a state's consent to suit must be "unequivocally expressed" and that a state does not waive its Eleventh Amendment immunity "merely by consenting to suit in the courts of its own creation . . ., by stating its intention to 'sue and be sued' . . ., or even by authorizing suits against it in 'any court of competent jurisdiction'") (citations omitted)). Because the State of Michigan has not issued a

"clear declaration" expressly consenting to suit in federal court, and because neither MLEOTC nor the state voluntarily invoked federal jurisdiction in this case, the defendants have not waived their Eleventh Amendment immunity.

The third and final situation in which the Eleventh Amendment will not bar a private action against a state occurs when Congress has validly abrogated the state's sovereign immunity pursuant to its power under § 5 of the Fourteenth Amendment to enact legislation protecting constitutional rights from infringement by the states. It is this exception that we considered in *Popovich*, and that provides the only possible basis for allowing Reese to proceed with his Title I claims against the defendants.

In *Seminole Tribe*, the Supreme Court held that Congress may abrogate Eleventh Amendment immunity pursuant only to Section 5 of the Fourteenth Amendment. *See Seminole Tribe,* 517 U.S. at 55 (invalidating Congress's attempt to abrogate state sovereign immunity pursuant to the Indian Commerce Clause in Article I). Section 1 of the Fourteenth Amendment provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Section 5 then gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." *Ibid.*

As the Supreme Court observed in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the "Eleventh Amendment, and the principle of state sovereign immunity which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456. Since *Seminole*, however, the Court has narrowly construed Congress's power

to abrogate Eleventh Amendment immunity pursuant to § 5. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court explained that Congress's power under § 5 is "remedial in nature," and emphasized that Congress "does not enforce a constitutional right by changing what the right is." *Id. at 519.* Thus, the Court held that, in order for legislation to constitute a valid exercise of Congress's power under § 5 of the Fourteenth Amendment, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-20.

Applying *Boerne*, the Court in *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, (College Savings Bank I)*, 119 S. Ct. 2199 (1999), invalidated Congress's attempt to abrogate Eleventh Amendment immunity from suits brought pursuant to federal patent legislation because the Court found that Congress failed to identify a "pattern of patent infringement by the States, let alone a pattern of constitutional violations," that would justify the harsh remedy of subjecting states to suit under the Patent Remedy Act. *See id.* at 2207 (distinguishing valid abrogation in suits brought pursuant to voting rights legislation enacted in response to an "undisputed record of racial discrimination"). The Court reached a similar decision last Term in *Kimel*, in which it held, based on an "examination of the ADEA's legislative record," that "Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem." As the Court proceeded to explain, "Congress never identified any pattern of age discrimination whatsoever that rose to the level of a constitutional violation," and thus failed to justify its characterization of the ADEA as "prophylactic legislation"

enacted pursuant to § 5 of the Fourteenth Amendment. *Id.* at 649-50 (citing *Boerne*, 521 U.S. at 531-32).

In light of the Court's decision in *Kimel*, we recently joined the Fourth Circuit in holding that Congress exceeded its power under § 5 of the Fourteenth Amendment when it attempted to abrogate state sovereign immunity in suits brought pursuant to Title II of ADA because Congress's decision to extend the ADA's broad anti-discrimination provisions to the states was not supported by sufficient evidence of unconstitutional discrimination in public accommodations. *See Popovich*, 2000 WL 1335555, at *15 (citing *Brown v. North Carolina Div. of Motor Veh.*, 166 F.3d 698, 708 (4th Cir. 1999)).[10] Bound as we are by our recent decision in *Popovich* and by the Supreme Court's Eleventh Amendment jurisprudence, we will not address the merits of this case if we find that the Eleventh Amendment precludes Reese from pursuing his ADA claims against MLEOTC. In order to determine whether the Council is immune from suit, we must answer two questions. First, we must decide whether MLEOTC is truly an arm of the state of Michigan so that a claim against the Council is, in effect, a claim against

---

[10]*But see Amos v. Maryland Dep't of Public Safety and Correctional Servs.*, 178 F.3d 212 (4th Cir. 1999) (holding pre-*Kimel* that the Eleventh Amendment did not preclude state prisoners from suing the state of Maryland for violating the ADA because Congress had validly abrogated the state's Eleventh Amendment immunity pursuant to its authority under § 5 of the Fourteenth Amendment); *Clark v. State of California*, 123 F.3d 1267 (9th Cir.), *cert. denied*, 118 S. Ct. 2340 (1997) (holding pre-*Kimel* that Congress acted within its authority under the Equal Protection Clause when it abrogated states' Eleventh Amendment immunity in disability discrimination suits filed under the ADA and the Rehabilitation Act).

the State itself. Second, we must determine whether there is any justification for refusing to extend our holding in *Popovich* - that Congress exceeded its authority under § 5 of the Fourteenth Amendment when it attempted to abrogate Eleventh Amendment immunity in suits arising under Title II of the ADA - to the present case, which was filed pursuant to Title I of the statute.

MLEOTC's Immunity as an Arm of the State

It is clear that the State of Michigan and the State Department of Police, both named as defendants in Reese's complaint, are entitled to Eleventh Amendment immunity absent consent or valid Congressional abrogation of immunity pursuant to § 5 of the Fourteenth Amendment. *See Seminole Tribe,* 517 U.S. at 54-55; *see also Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n,* 450 U.S. 147, 150 (1981) (treating an agency of state government - the Florida Department of Health - as a part of the state for purposes of Eleventh Amendment immunity); *Auer v. Robbins,* 519 U.S. 905, 908 n.1 (1997) (finding that the St. Louis Board of Police Commissioners was not part of the state for Eleventh Amendment purposes even though a majority of its members were appointed by the Governor because, unlike in this case, financial responsibility for the Commission lay with the local government rather than with the state).

MLEOTC is similarly entitled to assert an Eleventh Amendment defense. The parties stipulate that MLEOTC is a state agency authorized by the state legislature to establish minimum selection and training standards for Michigan law enforcement officers. *See* M.S.A. § 28.601 *et seq.* MLEOTC consists of 11 members, including the state attorney general,

the director of the State Department of Police, and nine other individuals appointed by the governor, with the advice and consent of the state senate, from a roster of active members of, among other organizations, the Michigan Association of Chiefs of Police, the Michigan Sheriffs' Association, and the Michigan Chapter of the Fraternal Order of Police. *See* M.S.A. § 28.603. Although the Commission members do not receive a salary, they are entitled to be reimbursed for their expenses from the state treasury. In addition to setting standards for officer certification, the Council is authorized by the state to "[i]ssue certificates of approval to police training schools," "[c]ooperate with state, federal, and local police agencies to establish and conduct local or area schools," "[m]ake recommendations to the legislature on matters pertaining to qualification and training of law enforcement officers," and "[e]stablish a fee to recover the cost of testing and training individuals who are not employed by a Michigan law enforcement agency." M.S.A. § 28.611.

Because MLEOTC is a state agency and any judgment against the Council would be assessed against the state treasury, MLEOTC is entitled to Eleventh Amendment immunity absent valid abrogation by Congress. *See Regents of the Univ. of California v. Doe,* 117 S. Ct. 900, 904-05 (1997) (noting that the "question whether a money judgment against a state instrumentality . . . would be enforceable against the State is of considerable importance to [the Eleventh Amendment inquiry]" but emphasizing that, even if there is no real risk of state financial responsibility, entities that are clearly part of the state, such as a state university, are entitled to Eleventh Amendment immunity); *see also Florida Nursing Home Ass'n,* 450 U.S. at 150 (extending Eleventh

Amendment immunity to state agencies); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) (same).

The Eleventh Amendment as a Bar to Civil Damage Actions Under Title I of the ADA

Like Title II, which prohibits state and local governments from discriminating against qualified individuals with disabilities in the provision of public services, Title I of the ADA, which prohibits disability discrimination in employment, requires state and local governments to accommodate the disabilities of qualified individuals. *See* 42 U.S.C. § 12112(5)(A) (defining employment discrimination against the disabled as, among other things, the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business"); 42 U.S.C. § 12131(2) (prohibiting state and local governments from discriminating against any qualified individual with a disability who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

The ADA provision codified at 42 U.S.C. § 12202, purporting to abrogate States' Eleventh Amendment immunity in suits alleging disability discrimination in employment and in the provision of public services, by its terms applies

equally to Titles I and II of the statute. *See ibid.* ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in a Federal or State court of competent jurisdiction for a violation of *this chapter*" (emphasis added)). Before we can give effect to § 12202 with respect to Reese's Title I claims, however, we must answer two questions: "first, whether Congress unequivocally expressed its intent to abrogate [the defendants' Eleventh Amendment] immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Kimel,* 120 S. Ct. at 640 (citing *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989), for the proposition that Congress may abrogate states' Eleventh Amendment immunity "only by making its intention unmistakably clear in the language of the statute").

To pass constitutional muster, legislation purporting to abrogate Eleventh Amendment immunity pursuant to § 5 of the Fourteenth Amendment must have been passed in response to evidence of unconstitutional conduct by the states. The Supreme Court has made clear that disability is not a suspect class for purposes of equal protection analysis. *See Heller v. Doe,* 509 U.S. 312, 321 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 441-47 (1985). Thus, a state may discriminate against individuals on the basis of disability if the distinction at issue is rationally related to a legitimate state interest. *See Popovich, 2000 WL 1335555,* at *10. Because disability discrimination receives rational basis review, the ADA provisions prohibiting states from engaging in practices that have a disparate impact on the disabled, like the ADA provisions requiring states affirmatively to accommodate certain disabilities, forbid conduct that the Constitution permits. *See Erickson,* 207 F.3d at 949. This

does not mean that the states are immune from liability for disability discrimination. That courts must uphold state policies that have a disparate impact on the disabled if such policies are rationally related to a legitimate government interest does not change the fact that "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw,* 486 U.S. 71, 83 (1988). The Supreme Court's characterization of the disabled as a non-suspect class simply means that Congress cannot legitimately rely on § 5 of the Fourteenth Amendment to abrogate state sovereign immunity in suits brought pursuant to the ADA, because the ADA forbids states from engaging in conduct that, however unfair, would not violate the Equal Protection Clause. *Cf. Kimel,* 120 S. Ct. at 645 (holding that the "substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act").

In *Popovich*, we held that although Congress "clearly and unequivocally stat[ed] its intent to abrogate Eleventh Amendment immunity under the ADA," there is "virtually no evidence that the States have engaged in a widespread pattern of unconstitutional discrimination against the disabled in the provision of public services," and therefore no justification under § 5 of the Fourteenth Amendment for Congress's attempt to abrogate the states' Eleventh Amendment immunity in suits brought under Title II of the statute. *Popovich,* 2000 WL 1335555, at *13 (citing the ADA's legislative history as well as evidence and testimony presented to Congress during floor debates). As we recognized in reaching this conclusion, "Congress did include some specific findings in the ADA... identifying discrimination against the disabled as a 'serious

and pervasive social problem' and stating that discrimination against the disabled affects 'access to public services.'" *Popovich,* 2000 WL 1335555, at *14 (quoting 42 U.S.C. § 12101(a)(2)-(3)). However, the ADA's legislative history reveals that many of the studies documenting disability discrimination pertained only to the private sector, and, as the Supreme Court noted in *Kimel*, evidence of discrimination in the private sector cannot necessarily be "extrapolated to support a finding of unconstitutional . . . discrimination in the public sector." *Kimel,* 120 S. Ct. at 649. There is, moreover, no proof that discrimination in public employment is so pervasive that Title I's strict prohibitions on discrimination, much less its requirements for affirmative accommodation of employees' disabilities, are necessary to ensure equal protection. To the contrary, Title I's requirement that employers affirmatively accommodate individuals who suffer from disabilities "extends beyond the anti-discrimination principle" and cannot properly be applied to the states in the guise of equal protection legislation enacted pursuant to § 5 of the Fourteenth Amendment. *Erickson v. Board of Governors,* 207 F.3d 945, 949-50 (7th Cir. 2000) ("[T]o say that in devising these new rules Congress is just enforcing a substantive command present in § 1 of the Fourteenth Amendment since 1868 would be a legal fiction [and] *Boerne, Florida Prepaid*, and *Kimel* hold that fictions do not support legislation under § 5").

As the Seventh Circuit observed in *Erickson*, the "ADA's main target is an employer's rational consideration of disabilities," and "[r]ational discrimination by definition does not violate a constitutional provision that condemns only irrational distinctions based on disabilities." *Id.* at 949. In *Boerne* and again in *Kimel*, the Supreme Court emphasized

that Congress exceeds its authority under § 5 of the Fourteenth Amendment when it subjects the states to broad prophylatic legislation without evidence of "congruence and proportionality" between the injury the legislation seeks to remedy and the "means adopted to that end." *Boerne,* 521 U.S. at 519-20; 532 (finding the Religious Freedom Restoration Act (RFRA) "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior"); *see also Kimel*, 120 S. Ct. at 647 (making an identical finding with respect to the ADEA); *College Savings Bank I,* 119 S. Ct. at 2207 (finding that the Patent Remedy Act failed to meet the congruence and proportionality test adopted in *Boerne* because Congress "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"); *Erickson,* 207 F.3d at 945 (noting in upholding Eleventh Amendment immunity in a suit brought pursuant to Title I of the ADA that the ADA, like RFRA, "replace[d] the Constitution's approach with a prohibition of disparate impact and jettison[ed] neutrality in favor of accommodation"). Because we find that Title I of the ADA, like Title II, was not enacted in response to a "widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation," we hold that the lower court's judgment against the defendants, entered pursuant to Titles I and II of the ADA, cannot stand. *See College Savings Bank I,* 119 S. Ct. at 2210 (quoting Boerne, 521 U.S. at 526).

In reaching this conclusion we do not mean even to suggest that the problems that confront disabled Americans are inconsequential. To the contrary, the ADA is a valid exercise of Congress's power under the Commerce Clause to

prohibit even rational discrimination on the basis of disability, which, as the Seventh Circuit recently observed, "bear[s] especially heavily on a class of persons who, [unfortunately], [already] suffer from diminished human (and often financial) capital." *Erickson,* 207 F.3d at 949-50. However, because the Supreme Court has made clear that Congress "lacks power under Article I to abrogate the States' sovereign immunity," the ADA's validity under the Commerce Clause cannot serve as the basis for valid abrogation of state sovereign immunity to suits brought under the statute. *Kimel,* 120 S. Ct. at 643 (citing *Seminole Tribe,* 517 U.S. at 72-73).

III

Congress enacted the ADA to achieve the admirable goal of ensuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals. 42 U.S.C. § 12101(a)(8). However, as we observed in *Popovich*, "admirable, even desirable goals are not always consistent with constitutional limitations, [and] in such cases, we are bound to follow the constraints of the Constitution." *Popovich,* 2000 WL 1335555, at *15. Because the Eleventh Amendment precludes Reese from pursuing his claims against the defendants, we **REVERSE** the judgment of the lower court and **REMAND** the case in order that the district court may enter an order dismissing Reese's ADA claims in a manner consistent with this opinion.

Martha Craig Daughtrey, dissenting. The facts giving rise to this litigation date back to 1991. The complaint was filed in 1997, and the jury returned a verdict in the plaintiff's favor in 1998. The notice of appeal was filed in 1999, and we heard oral argument in 2000. As the majority

notes in its opinion, not once in all that time did defendant State of Michigan raise an Eleventh Amendment immunity defense to the plaintiff's claim of employment discrimination under the ADA. Nothing in the law requires us to raise the defense on the state's behalf *sua sponte*, and it strikes me as unnecessary – and, indeed, unfortunate, if not unfair – to do so at this late date.

The majority recognizes that under existing Supreme Court precedent, "a court need not address Eleventh Amendment immunity if the parties fail to raise it." Specifically, in *Wisconsin Department of Corrections v. Schacht*, the Court held:

> The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, *a court can ignore it*.

524 U.S. 381, 389 (1998) (citations omitted) (emphasis added). Is this a case for such "judicial ignorance"? I firmly believe that if the question ought ever to be ignored, this case fits the bill.

First, there is the investment of judicial resources in a now-completed jury trial, and the state's obvious disinterest in asserting an immunity claim heretofore. Implicit in its general appearance in this litigation without such an assertion, there has been a waiver of sovereign immunity by the state.

Additionally, there would seem to be no need for us to reach out and decide a question, unraised, un-briefed, and un-argued by the parties, in an unpublished opinion, when this very issue is before the Supreme Court in *University of Alabama at Birmingham Board of Trust v. Garrett*, 120 S. Ct. 1669 (2000) (certiorari granted on issue of whether the ADA is a valid Congressional abrogation of the Eleventh Amendment). Finally, even in light of our recent *Title II* ADA ruling in *Popovich v. Cuyahoga County Court*, ___F.3d___, (6th Cir. 2000), until the Supreme Court has directed us to do otherwise in the context of a *Title I* case, I believe that we should follow the lead of those of our sister circuits holding that the states do not have immunity from suit brought under the ADA. In addition to the cases cited in footnote 10 of the majority opinion, *see, e.g., Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999), and *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999).

For these reasons, I would – with the Supreme Court's blessing – "ignore" the pseudo-jurisdictional question deemed dispositive by the majority and instead reach the merits of this case, affirming the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed January 11, 1999]

No. 2:97-cv-189
CONSENT CASE

DAVID J. REESE,
Plaintiff,

v.

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, LAW ENFORCEMENT OFFICERS TRAINING COUNCIL,
Defendant.

OPINION

Defendant State of Michigan, Department of State Police, Law Enforcement Officers Training Council (MLEOTC) filed a post trial Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial. On October

2, 1998, judgment was entered on plaintiff David J. Reese's discrimination action pursuant to the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, *et seq.*, against defendant after a jury found in plaintiff's favor. MLEOTC is a state agency which has authority under MCLA 28.601; MSA 4.450(1) to certify applicants as law enforcement officers. Plaintiff was initially denied certification on June 21, 1991, because he did not pass a color perception test administered by defendant. The parties filed a consent to proceed before the undersigned pursuant to 28 U.S.C. § 636(c). This matter has been fully briefed by the parties. A hearing was held on December 16, 1998.

Prior to trial, the Court denied defendant's motion to dismiss or, in the alternative, for summary judgment in an Opinion and Order dated May 29, 1998. On June 26, 1998, the Court entered a supplemental order submitted by the parties denying defendant's motion to dismiss and granting partial summary judgment to plaintiff on the issue of whether plaintiff was a person with a disability within the meaning of the ADA. Defendant argues that based on the cross-examination of plaintiff during trial, it is now clear that plaintiff cannot be considered to have a disability within the meaning of the ADA. According to defendant, plaintiff testified that the only colors he could not distinguish were brown and dark green and some pastels. Further, defendant points to testimony from plaintiff's expert and from plaintiff which established that plaintiff developed an ability to "compensate" for his color vision deficiency. Defendant argues that the Court, in denying summary judgment, erroneously relied on the factually similar Eighth Circuit decision in *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997). In *Doane*, the plaintiff, blind in one eye, successfully

sued under the ADA, after the city refused to rehire him as a police officer. The city in *Doane* argued that the plaintiff could not establish that his blindness in one eye substantially limited one or more of his major life activities. The court concluded that plaintiff's permanent blindness in one eye substantially limited plaintiff's major life activity of seeing. Defendant argues that *Doane* should not be followed because it is contrary to *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997),[1] which requires the court to consider mitigating measures when deciding whether a plaintiff is disabled within the meaning of the ADA. The court in *Doane* stated:

> We conclude that Doane is an individual with a disability within the meaning of the ADA. His glaucoma caused permanent blindness in one eye which substantially limits Doane's major life activity of seeing. The manner in which Doane must sense depth and use peripheral vision is significantly different from the manner in which an average, binocular person performs the same visual activity. Doane's brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments to the impairment do not take him outside of the protective provisions of the ADA.

---

[1]Defendant has also cited *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997), where the court held that blindness in one eye is not a disability within the meaning of the ADA, because the plaintiff had normal vision in his other eye.

> The city urges us to follow the Fifth Circuit's holding that "a person is not handicapped if his vision can be corrected to 20/200." *Chandler v. City. of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, 511 U.S. 1011, 114 S. Ct. 1386, 128 L.Ed.2d 61 (1994). Because Doane's vision is correctable to 20/20, the city argues, he is not a person with a disability within the meaning of the ADA. We decline to apply the Fifth Circuit's holding in this case. We must consider each situation on a case by case basis. Doane's vision impairment stems not merely from overall poor eyesight but from total blindness in one eye due to glaucoma, which significantly restricts the manner in which Doane performs the major life activity of seeing. Thus, Doane is a person with a disability entitled to the ADA's protection.

Id. at 627-28.

Defendant relies on the separate opinions in *Gilday*, which reversed the lower court's grant of summary judgment and conclusion that the plaintiff was not disabled. In that case, the three circuit court judges disagreed in their legal analysis of what should be considered when determining whether an individual is considered disabled within the meaning of the ADA. The judges agreed, however, that a factual issue existed whether the plaintiff was disabled. Judge Moore concluded that mitigating measures should not be considered when determining whether an individual has a

disability within the meaning of the ADA. Judge Kennedy disagreed, concluding that the court must make:

> an individualized inquiry, which depends upon the particular circumstances at issue . . . . [I]t may well be in some instances that the controlling medication (or other mitigating measure) will itself impose a substantial limitation on an individual's major life activities. In such cases, the individual will be "disabled" under the ADA. But where an impairment is fully controlled by mitigating measures and such measures do not themselves substantially limit an individual's major life activities, I believe the ADA provides no protection.

Id. Judge Guy wrote a separate opinion stating in part:

> In my view, the impact of mitigating measures must be decided on a case-by-case basis. In some cases a person with a "controlled" medical problem or condition will be completely functional and should be evaluated as such. In other cases a person with a controlled medical condition may still be under a disability as defined by the Act. Indeed, what is necessary to "control" the condition may be part of what makes the person disabled.

Id. at 768.

Defendant has taken this analysis to the extreme. Defendant argues that any individual who develops compensatory techniques to overcome a disability or medical condition is not disabled under the ADA because the compensatory technique is a mitigating factor which must be considered by the Court. At the hearing, defendant candidly conceded that under this analysis hardly anyone could be considered to have a disability under the ADA. Indeed, defendant could cite to the Court only two examples of individuals who could be considered disabled under the defendant's theory: a person suffering with HIV or AIDS, or a person with terminal cancer. Contrary to defendant's suggestion, even *Gilday* makes it clear that the ADA is not limited to protect only persons with diseases that cannot be corrected by medication or compensatory techniques. In *Gilday*, the court determined that a question of fact existed whether plaintiff, an insulin dependent diabetic, could be considered disabled under the act even when considering his use of medication. As Judge Kennedy and Judge Guy stated, each decision should be made on a case-by-case basis.

In this case, plaintiff Reese is clearly disabled within the meaning of the ADA even if the Court were to consider plaintiff's ability to overcome his color vision deficiency as a mitigating measure. Plaintiff testified at trial that he did have difficulty distinguishing greens and browns and difficulties with some pastel colors. Plaintiff admitted that he had failed color vision tests. Plaintiff testified that he had superior visual acuity, better than 20/20 vision, and learned to pay particular attention to details other than colors to compensate for his inability to distinguish color. Plaintiff clearly established that his color vision deficit is a substantial impairment to his major life activities of seeing and working

and that he is disabled under the ADA. The fact that plaintiff learned compensatory techniques to function as a police officer did not make plaintiff lose his disability status under the ADA. Plaintiff will always have a color vision deficiency. There is no medicine available which could control his color deficiency, nor could plaintiff wear glasses which could correct this deficiency. Every day plaintiff sees differently than the average person, no mitigating measures are available to the plaintiff.

More importantly, the evidence presented at trial established that defendant perceived plaintiff to have an impairment, 42 U.S.C. § 12102(2)(C). At trial William Nash, MLEOTC Section Chief for Employment Standards, testified that MLEOTC believed that plaintiff's inability to distinguish colors as evidenced by plaintiff's failure to successfully pass Optometrist Dr. Vincent King's administering of the Farnsworth D-15 test and the Farnsworth Navy Lantern test, prevented plaintiff from performing all functions of a police officer. Moreover, Nash testified that he perceived plaintiff's inability to distinguish colors as a threat to the safety of other officers. Further, Dr. King who testified as defendant's expert and is the MLEOTC consultant who administers vision tests to applicant's seeking police officer certification, testified in detail that plaintiff suffered with a vision impairment that prevented him from obtaining police officer certification. Defendant has now attempted to distance itself from Dr. King's testimony by arguing Dr. King was only an independent contractor and cannot bind the defendant through his expert testimony. Dr. King was more than a trial expert in this case. Dr. King conducted the tests which prohibited plaintiff's certification as a police officer. In addition, Dr. King helped establish MLEOTC's color

vision requirements for police officer certification. The evidence presented at trial and throughout this case overwhelmingly establishes that plaintiff was perceived to have an impairment, a color vision deficiency or color blindness, which substantially limited his ability to see and work. The facts of this case are unlike the facts presented in *Andrews v. State of Ohio*, 104 F.3d 803 (6th Cir. 1997). In *Andrews*, the court held that police officers who were overweight were not disabled within the meaning of the ADA, because simply being overweight is not a physical or mental impairment, but a physical characteristic not covered by the ADA or within the definition of impairment under the federal regulations. *Id.* at 808. The court held that physical characteristics not the result of physiological disorder are not impairments covered under the ADA for actual or perceived disability. *Id.* Plaintiff Reese does not suffer with a simple physical characteristic, but rather has a color vision deficiency which clearly has physiological origins. *Id.* at 810.

Accordingly, defendant's Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial will be denied.

Dated: January 11, 1999

/s/_____
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed January 11, 1999]

No. 2:97-cv-189
CONSENT CASE

DAVID J. REESE,
Plaintiff,

v.

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, LAW ENFORCEMENT OFFICERS TRAINING COUNCIL,
Defendant.

ORDER

In accordance with the Opinion issued herewith,

IT IS HEREBY ORDERED that defendant's Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial (Docket #48) is DENIED.

Dated: January 11, 1999

/s/_____
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed October 2, 1998]

No. 2:97-CV-189

DAVID J. REESE,
Plaintiff,

v.

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, LAW ENFORCEMENT OFFICERS TRAINING COUNCIL,
Defendant.

JUDGMENT

Hon. Timothy P. Greeley

At a session of said Court held on the 2nd day of October, 1998, in the City of Marquette, County of Marquette, and State of Michigan.

District Court Judgment - 10/2/98

PRESENT: Magistrate Timothy P. Greeley

******

This matter came on for jury trial which commenced Wednesday, September 9, 1998.

On Friday, September 11, 1998, the case was submitted to the jury based upon stipulated Special Jury Verdict issues. Questions concerning equitable relief were, pursuant to stipulation, reserved to the Court subject to the jury's Special Verdict.

On Friday, September 11, 1998, the jury specifically found that Plaintiff was qualified to perform the essential functions of a certified law enforcement officer for the State of Michigan; and that Defendant failed to prove Plaintiff could not perform the essential functions of a law enforcement officer without presenting a direct threat to the health or safety of himself or others.

Based on the Special Verdict rendered by the jury, **IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:**

1. Judgment is ENTERED in favor of Plaintiff on the basis that Defendant unlawfully discriminated against Plaintiff by refusing to certify him as a law enforcement officer for the State of Michigan, in violation of the Americans With Disabilities Act.

2. Defendant shall consider Plaintiff's Application for Certification without consideration of his color vision deficit.

3. Within seven (7) business days of receipt of certification by the Escanaba Public Safety Department, that Plaintiff has satisfied the employment standards for Michigan law enforcement officers as set forth on attached **Exhibit "1"** (with the exception of those which have been lined out on **Exhibit "1"**) Defendant shall certify Plaintiff for duty as a law enforcement officer.

4. Defendant shall reimburse Plaintiff for all court costs and attorney's fees and expenses related to the successful prosecution of Plaintiff's claims, in the total amount of $60,000.00, which amount is stipulated by the parties to be a reasonable attorney's fee through the entry of this Judgment. If not paid within thirty (30) days, Defendant shall further be required to pay interest on such award of fees, at the rate established in 28 U.S.C. § 1961(a).

5. Provided further, that nothing herein shall be construed to preclude further awards of attorney's fees and expenses in the event Defendant files post-Judgment proceedings or appeals in this or any other Court.

Dated: 10/2/1998

/s/_____
Magistrate Timothy P. Greeley

APPROVED AS TO FORM,
NOT CONTENT

/s/_____
John F. Szczubelek
Attorney for Defendant

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed June 26, 1998]

No. 2:97-CV-189

DAVID J. REESE,
Plaintiff,

v.

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, LAW ENFORCEMENT OFFICERS TRAINING COUNCIL,
Defendant.

SUPPLEMENTAL ORDER

At a session of said Court held in the City of Marquette, County of Marquette, and State of Michigan, on the 25th day of June, 1998.

PRESENT: Honorable Timothy P. Greeley,
Magistrate Judge

This matter having come become before the Court on the Defendant's Motion to Dismiss; Briefs and oral argument having been had; the Court being otherwise fully advised in the premises; now therefore it is hereby order and adjudged as follows:

1. Defendant's Motion to Dismiss is denied, for reasons stated in the written Opinion of the Court dated May 29, 1998.

2. That partial Summary Judgment in favor of Plaintiff be and is hereby granted, on the basis that there is no genuine issue as to any material fact and Plaintiff is a person with a disability within the meaning of the American's with Disabilities Act, 42 USC §12102(2), for the reasons stated in the Court's written Opinion dated May 29, 1998.

Dated: June 25, 1998

/s/_____
Honorable Timothy P. Greeley
Magistrate Judge

APPROVED AS TO FORM ONLY:

/s/_____
Terry F. Burkhart
Attorney for Plaintiff

/s/_____
John F. Szczubelek
Attorney for Defendant

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed May 29, 1998]

No. 2:97-cv-189
CONSENT CASE

DAVID J. REESE,
Plaintiff,

v.

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, LAW ENFORCEMENT OFFICERS TRAINING COUNCIL,
Defendant.

OPINION

Plaintiff David J. Reese filed this discrimination action pursuant to Title I of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq., against the

State of Michigan, Department of State Police, law Enforcement Officers Training Council (MLEOTC). MLEOTC is a state agency which has authority under MCLA 28.601; MSA 4.450(1) to certify applicants as law enforcement officers. Plaintiff was initially denied certification on June 21, 1991, because his color perception did not test normal. Plaintiff sought reconsideration of defendant's decision which was ultimately denied. Plaintiff argues that defendant's policy denying certification to applicants who have impaired color vision acts as an illegal blanket exclusion without consideration of the applicant's abilities to perform the duties of a law enforcement officer in the State of Michigan. Moreover, plaintiff argues that the policy has an adverse impact on men because color vision deficiency is a sex-related trait. It is undisputed that plaintiff was a highly decorated law enforcement officer in the State of Illinois, for over 10 years, prior to his application in the State of Michigan. Moreover, the city of Escanaba is willing to hire plaintiff as a law enforcement officer despite his color vision problem. Indeed, plaintiff was employed between May 1, 1993 and July 20, 1993 as a full-time law enforcement officer for the city of Escanaba while his application for certification was pending. Plaintiff is currently a City of Escanaba Public Safety Officer, but works exclusively as a fireman without law enforcement duties. Plaintiff has been warned that if he is unable to become certified as a law enforcement officer, he will be subject to termination because Escanaba Public Safety Officers must perform both police officer and firefighter duties.

The parties filed a consent to proceed before the undersigned pursuant to 28 U.S.C. § 636(c). Presently before the Court is the defendant's Motion to Dismiss, pursuant to

Fed. R. Civ. P. 12(b)(6), and/or Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56. Plaintiff has filed a response and the matter is ready for decision. A hearing was held on May 21, 1998.

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the pleading, requiring the court to determine whether the plaintiff would be entitled to relief if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle [the plaintiff] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must construe the complaint in the light most favorable to plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A judge may not dismiss the complaint simply because he disbelieves the complaint's factual allegations. *Conley*, *supra*, at 47.

Generally, a complaint need only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *In re DeLorean Motor Co. v. Weitzman*, 99I F.2d 1236, 1240 (6th Cir. 1993) (*quoting Conley*, *supra*, at 47). The fundamental purpose of pleadings under the Federal Rules of Civil Procedure is to give adequate notice to the parties of each side's claims and to allow cases to be decided on the merits after an adequate development of the facts. *Mayer*, *supra*, at 638. While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *DeLorean*, *supra*, at 1240. "In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (internal quote omitted).

Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v., Catrett*, 477 U.S. 317, 322-323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Id.* at 324-25. The nonmoving party cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). While the evidence must be viewed in the light most favorable to the nonmoving party, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 251-52 (1986). Ultimately, the Court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

Defendant argues that dismissal is appropriate because defendant is not a covered entity under either the ADA or Title VII of the Civil Rights Act. Under the ADA, a covered entity is defined as "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111. Accordingly, defendant argues that it does not meet the definition of employer under Title VII. The meaning of employer under both the ADA and Title VII of the Civil Rights Act are the same. *Carparts Distribution Center Inc. v. Automotive Wholesalers*,. 37 F.3d 12, 16 (lst Cir. 1994). Plaintiff argues that in *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990 (6th Cir. 1997), the Sixth Circuit extended the definition of employer under the ADA.

The Sixth Circuit concluded that the term employer as used in the ADA extended beyond the direct employer to include: whether two entities are so interrelated that they may be considered a "single employer" or an "integrated enterprise," whether one entity has control over another entity's employees sufficient to show that the two entities are acting as a "joint employer" of those employees, or whether the person or entity which took the allegedly illegal employment action was acting as the agent of another company. *Id.* at 993.

While it is unlikely that plaintiff can establish that defendant is an employer under any of these circumstances, plaintiff argues that defendant's refusal to certify plaintiff, making it impossible for the City of Escanaba to employ plaintiff as a law enforcement officer, establishes sufficient control to trigger liability as an employer under the ADA and Title VII. Plaintiff cites *Frank v. U.S. West Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1993), as authority for the proposition that the critical question is what entity made the final decision regarding the employment of the person claiming discrimination. In *West*, employees of a telephone company brought a discrimination action against the telephone company's parent corporation. In discussing whether the parent company could be considered an employer under the ADA and Title VII, the court stated that centralized control of labor relations is one important factor in the four part integrated enterprise test used for determining whether a parent company can be considered an employer of an employee of the subsidiary.[1] It is undisputed that plaintiff

---

[1] Certainly, that case is not controlling under the circumstances presented here, because the corporate parent/subsidiary relationship is not present. The other factors used

would be employed as a police officer for the city of Escanaba, but for MLEOTC's action of rejecting plaintiff's application for certification as a police officer in the State of Michigan.

The Sixth Circuit, however, does not require a traditional employment relationship under Title VII. *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870 (6th Cir. 1991).

> As the trial court noted, our case law requires that "[t]he term 'employee' in Title VII 'must be read in light of the mischief to be corrected and the end to be attained.'" J.App. at 70 (Order denying motion for new trail, quoting *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983)). Further, we have repeatedly said that "Title VII of the Civil Rights Act should not be construed narrowly." *Tipler v. E.I. duPont deNemours and Co.*, 443 F.2d 125, 131 (6th Cir. 1971). In this spirit, several courts have held that Title VII does not require a formal employment relationship between the plaintiff and the defendant. Rather, a plaintiff is protected if the defendant is one "who significantly affects access of any individual to employment opportunities." *Doe v. St. Joseph's Hosp.*, 788 F.2d 411,422-25 (7th Cir. 1986) (doctor stated a claim under

---

to determine the employment relationship, in this context, include interrelation of operations, common management, and common ownership or financial control. *Id.* at 1362.

> Title VII when hospital denied staff privileges even though doctor was not an employee of the hospital); *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983) (finding a cause of action under Title VII when"'a defendant subject to Title VII interferes with an individual's employment opportunities with another employer.") (quoting *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 n. 3 (9th Cir. 1980)).

Id. at 874-75. Under this interpretation of employer, MLEOTC is a proper defendant under both the ADA and Title VII. MLEOTC has rendered the final judgment in deciding whether plaintiff is employable as a police officer for the city of Escanaba. But for MLEOTC's conclusion that plaintiff cannot become a certified police officer, due to his color vision deficiency, plaintiff would be employed as a police officer in the city of Escanaba despite his color vision deficiency. Clearly, MLEOTC has affected plaintiff's employment opportunities as a police officer in the State of Michigan, and particularly with the city of Escanaba.

Moreover, defendant can be considered a public entity under Title II of the ADA. Defendant concedes that the complaint can be read to include a claim under Title II without a formal amendment. Defendant does not challenge the conclusion that it is a public entity under Title II. A public entity is defined as any state or local government, any department, agency, special purpose district, or other instrumentality or a state or states or local government. 42 U.S.C. §§ 12131(A) and (B). In *Stillwell v. Kansis City, Missouri Board of Police Commissioners*, 872 F. Supp. 682

(W.D. Mo. 1995), a case factually similar, the police licensing board was considered a public entity under the ADA. The court in *Stillwell* found that the licensing board's blanket exclusion from licensing applicants who had lost a hand, violated the ADA and due process. The court ordered the defendant to individually assess plaintiff's application to allow plaintiff the opportunity to demonstrate that he could meet the physical requirements of a Kansis City police officer with or without reasonable accommodation.

Defendant argues that plaintiff's ADA claim should be dismissed because he cannot show that he has a substantial limitation of a major life activity. Plaintiff must establish that he has a disability as defined under 42 U.S.C. § 12102(2)(A)-(C). A person is considered disabled under the statute if they have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." *Id.* Defendant relies on *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985), to establish that plaintiff does not qualify as disabled. In *Jasany*, the plaintiff had difficulty operating a mail sorting machine because he was cross-eyed. The court found that plaintiff did not have a physical impairment that substantially limits a major life activity, because the alleged disability only affected the plaintiff's ability to perform one particular job for one particular employer.

Defendant argues that plaintiff has testified in his deposition that his color deficiency only affects his employment opportunities and his ability to color coordinate things such as clothes or paint. Moreover, according to defendant, since plaintiff has performed law enforcement

duties outside the state, plaintiff is not disabled. Plaintiff argues that he is disabled or at least is considered disabled by defendant. Defendant's own optometry expert has identified a number of jobs that require fine color discrimination which plaintiff could not perform. Plaintiff argues that *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), is factually similar to this case. In *Doane*, the plaintiff, blind in one eye, successfully sued under the ADA, after the city refused to rehire him as a police officer. The city in *Doane* argued that the plaintiff could not establish that his blindness in one eye substantially limited one or more of his major life activities. The court concluded that plaintiff's permanent blindness in one eye substantially limited plaintiff's major life activity of seeing. Similarly, in this case, plaintiff's color deficiency substantially limits his major life activity of seeing and working. Moreover, unlike the postal worker in *Jasany*, plaintiff is not limited because of his color deficiency from performing simply one job for one particular employer. Defendant's expert, Dr. King testified that there are a number of jobs that plaintiff cannot perform because of his color deficiency. Further, there can be no dispute that defendant perceives plaintiff as disabled. *Doane*, 115 F.3d at 628.

Defendant argues that plaintiff has admitted that he has been told he cannot identify colors and, therefore, plaintiff cannot perform an essential function of the job of a certified police officer. Moreover, defendant contends that plaintiff admitted that his inability to identify colors could be related to an essential job function of a police officer. Defendant offers a number of examples as to how a color blind officer may have difficulty on the job. However, plaintiff was a police officer in Illinois and also performed duties as a police officer in Escanaba while his application was pending.

Defendant has not established how this plaintiff is unable to perform the duties of a police officer because of his inability to distinguish colors. It appears that defendant has no actual knowledge of whether plaintiff can satisfactorily perform duties as a police officer, with or without accommodation, despite his color deficiency. Moreover, while defendant argues that a number of duties could not be performed properly by an officer who is considered color blind, plaintiff argues that he can present evidence establishing that he can perform each of the tasks which defendant contends require color vision without problem. Plaintiff has argued that he is able to identify many colors, and can compensate for his color vision deficiency through superior visual acuity, better than 20/20 vision, and by paying attention to details. A question of fact exists as to whether plaintiff can function as a police officer despite his color deficiency.

Defendant argues that plaintiff cannot show discriminatory intent because, at most, defendant relied on an erroneous scientific judgment. Defendant cites *Pesterfield v. TVA*, 941 F.2d 437 (6th Cir. 1991), for the proposition that a decision based on reasoned medical judgment does not equate to discriminatory intent. There the court stated that a plaintiff alleging disparate treatment rather than disparate impact must prove discriminatory intent.

> The question is thus not whether TVA's decision that plaintiff was not employable due to his psychiatric condition was correct measured by "objective" standards. What is relevant is that TVA, in fact, acted on its good faith belief about plaintiff's condition based on Dr. Paine's opinion, and, as the district court

pointed out, there is no proof to the contrary. See *Dister v. Continental Group. Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) ("[T]he reasons tendered need not be well-advised, but merely truthful."); *Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 718 (5th Cir. 1983) ("The trier of fact is to determine the defendant's intent, not adjudicate the merits of the facts or suspicions upon which it is predicated."); *Jones v. Orleans Parish School Bd.*, 679 F.2d 32, 38 (5th Cir.), modified on other grounds, 688 F.2d 342 (5th Cir. 1982), cert. denied, 461 U.S. 951,103 S.Ct. 2420, 77 L.Ed.2d 1310 (1983) ("Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge."); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) ("[W]hether HCCAA was wrong in its determination that Jefferies acted in violation of HCCAA guidelines . . . is irrelevant . . . [W]here an employer wrongly believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief."); *Fahie v. Thornburgh*, 746 F. Supp. 310, 315 (S.D.N.Y. 1990) ("[T]he Bureau's honestly held, although erroneous, conviction that [plaintiff] was not a good employee is a legitimate ground for dismissal.") (emphasis added).

> In the present case, the district court found that TVA's medical staff reasonably relied upon the medical report of plaintiffs private psychiatrist and reasonably interpreted its contents. Plaintiff has failed to prove that TVA's decision to terminate him was based upon a stereotyped attitude toward persons with psychological handicaps rather than upon a reasoned and medically supported judgment that plaintiff could not be returned to work safely under any accommodation that TVA could make.

Id. at 443.

Plaintiff claims that he is not required to show a discriminatory intent, but must establish that the alleged discriminatory practice was not accidental, inadvertent, or based upon a mistake. Plaintiff is alleging disparate impact. Plaintiff need not establish discriminatory intent in a disparate impact case. *Id.* To the extent that plaintiff is alleging disparate treatment, plaintiff must establish discriminatory intent. *Id.* A genuine issue of fact exists whether defendant acted with discriminatory intent in this action. Plaintiff may be able to establish that defendant's conduct in excluding persons considered color blind without evaluating their ability to perform the job of a police officer is based upon stereotyped attitudes toward persons with color vision disability, rather than sound medical judgment. *Id.*; *Stillwell*, 872 F. Supp. at 684-85; and *Doane*, 115 F.3d 626, (to obtain relief under the ADA plaintiff must establish that he is a (1) a disabled person within the meaning of the ADA, (2) that he is qualified to perform the essential functions of his job either

with or without accommodation, and (3) that he suffered an adverse employment action because of his disability.) Defendant should not be able to shield itself from liability by arguing that it simply relied on a medical expert. Defendant has admitted a lack of knowledge at the time of its decision to exclude plaintiff as a certified police officer, of any actual incidents, in any state, where a color vision deficient police officer failed to properly perform any duties. Further, while defendant concedes it based its decision to exclude an individual considered color blind on the California study, and it's own medical expert's opinion, the study and opinion, as plaintiff argues, may be flawed because it appears to be based on a failure to evaluate individual officer's color vision deficiencies, or consider ways to accommodate an officer's color vision deficiency.

Finally, for the reasons previously stated, a question of fact exists regarding whether defendant's action in excluding persons considered color blind, from certification as a police officer, is based on business necessity, or discriminatory conduct.

Accordingly, defendant's Motion to Dismiss and/or for Summary Judgment will be denied.

Dated: May 29, 1998

/s/_____
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Filed May 29, 1998]

No. 2:97-cv-189
CONSENT CASE

DAVID J. REESE,
Plaintiff,

v.

STATE OF MICHIGAN, DEPARTMENT OF STATE POLICE, LAW ENFORCEMENT OFFICERS TRAINING COUNCIL,
Defendant.

ORDER

In accordance with the Opinion issued herewith,

IT IS HEREBY ORDERED that defendant's Motion to Dismiss and/or for Summary Judgment (Docket #23) is DENIED.

Dated: May 29, 1998

/s/_____
TIMOTHY P. GREENLEY
UNITED STATES MAGISTRATE JUDGE